Opening Statement to Joint Oireachtas Justice Committee on Judicial Appointments Commission Bill 2020

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We would like to thank the Committee for the opportunity to offer evidence today. The view expressed in this opening statement reflects the views of three legal academics, from three different institutions across Ireland, who have all researched and studied the area of judicial appointments. We would like to take this opportunity to draw out several of the most important points from our longer written submission, and will be happy to answer questions the Committee might have about these, or any other matter raised in our submission or related to the Bill.

We would, in the first instance, note our enthusiasm for this proposed legislation. The reform of judicial appointments is long overdue, and we pleased to see progress on many fronts in the General Scheme of the Bill. We believe it avoids many of the missteps of previous proposals, and has much to commend it, such as the Chief Justice chairing the commission, and the provision for permanent staff for the Commission.

However, we are concerned that unless certain changes and improvements are made, this opportunity for meaningful reform will be wasted, and the Judicial Appointments Commission may be no more effective in improving Ireland's judicial appointment process than the Judicial Appointments Advisory Board—or JAAB—has been.

<u>Reduce number of recommend candidates and rank them</u>

The first matter we would highlight is the absolute necessity for more specificity in the recommendations from the Commission. It is widely acknowledged that the JAAB had little effect in influencing the decisions of government on appointments because it sent forward too many candidates, and did so with no ranking or order of preference.

Though the number of candidates the JAC would recommend per vacancy is smaller than the JAAB, it is not small enough. The Commission should recommend no more than three candidates per vacancy. It is also crucial, in our view, that the JAC be required to rank these candidates in order of preference. Having carried out detailed assessment procedures, it may be very obvious that certain candidates are more suitable for appointment, and it would be appropriate that this would be conveyed to Government so that this can be taken into account with regard to the final selection. If candidates are unranked, governmental

discretion will once again be largely unguided, and the any assessment procedures carried out by the JAC will not be fully utilised.

To be clear, the government will still be entirely free under the Constitution to pick whomsoever they choose for any judicial vacancy, from this list of recommendations or outside of it. The only consequence would be—as under the current system—that appointing a candidate other than one recommended through the appointments process is made known by a notice in the Iris Oifigiúil.

It is thus incorrect to suggest that it is an unconstitutional fetter on government discretion to provide a three-name list or a ranking of candidates; legally, the government's discretion is in no way fettered. Rather its determinations are guided and shaped by vetting processes and recommendations. If the government feels that it will not, in practice, depart from JAC recommendations for political or public perception reasons, that is not a constitutional fetter on the government's power. Rather, it is ensuring that the Government is selecting candidates based on merit, quality or other publicly-defensible reasons.

<u>Detailed selection criteria and processes</u>

The second matter we wish to address is the criteria and processes used by the JAC to recommend candidates. Compared to international best practice, the proposals in the General Scheme would be very scant as to how good judicial candidates can be selected. The General Scheme does not add any additional detail to the existing criteria for appointment, which have long been criticised as being vague, general, and lacking in any specificity as to the characteristics that are desirable or necessary to become a judge.

While a commitment to a merit-based process is welcome, further detail is required to elaborate on what merit, in practice, means. Including some detail as to this is crucial: merit—without more—is not a meaningful guide to judicial appointments unless it is elaborated upon, guiding the JAC on what types of candidates are desirable and meritorious. The merit criteria in England and Wales might be consulted for this purpose. Specificity as to a candidate's suitability 'on grounds of character and temperament' would be desirable, as would some suggestion of a process that the Commission might follow to establish this.

Moreover, the General Scheme does not detail the process the Commission should undertake in assessing candidates. Though it allows for various procedures such as interviews, this is insufficient: the JAAB was permitted to conduct interviews, but never did. The legislation should specify that candidates fill out application forms, undertake interviews, and, perhaps, engage in case studies or roleplay, as is common in Scotland. These must be included in the legislation; if left to the discretion of the Committee, such procedures may be dispensed with, leading to a much poorer process.

While we welcome the introduction of a commitment to diversity and equality in appointments, it would be useful to include a requirement for a diversity strategy and for diversity data management, or a requirement for the Commission to report on diversity in its annual reports.

The role of the Attorney General

Finally, we are of the firm belief that the central role of the Attorney General in the JAC should be reconsidered. If the Attorney General is removed from membership of the JAC the Commission would then have equal lay and legal representation, which reflects international best practice. Moreover, the Attorney General, as legal advisor to government, will surely have an intimate role in discussions of the government's final choice. Having the Attorney General also sit on the JAC gives the AG an outsize influence on the process.

The JAC is being set up as an external assistant to the government's selection of candidates, and is expressly stated in Head 11 to be independent. The Commission should thus not have this overlap with the government's process and its chief legal advisor. We see no merit in the inclusion of the AG on the Commission, and think this should be reconsidered. At the same time, it might be considered appropriate to exclude the AG from eligibility for recommendation by the JAC for a period of time after leaving office to avoid any potential conflict of interest in AG's advice to government on appointments.

Conclusion

In conclusion, this legislation is a critical opportunity to provide for fairness and transparency in a process that is currently regarded as flawed. It is crucial that the opportunity is taken to ensure real reform and to guarantee that the existing process is not simply replicated under the guise of reform. We thank the Committee again for this opportunity to discuss these issues, and welcome any questions you may have.